No. 250.

Brf. of Atty. of Plaintiffs in Error, Supreme Court, Kansas City, Mo.

v. Richards } O. C.

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

I.

THERE WAS NO AUTHORITY GRANTED TO ANY INDIAN OR INDIANS TO CUT, REMOVE, SELL, AND DELIVER TIMBER FROM THE RESERVATIONS MENTIONED IN THIS SUIT, EXCEPT AS SPECIFIED IN THE CONTRACTS SET FORTH IN THE PLEADINGS.

The fee to these lands remained in the United States. Unlawfully cutting timber upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under authority of the United States, is punishable with severe penalties. (Sec. 5388, R. S., as amended June 4, 1888, Sup. vol. 1, chap. 340, p. 588.) The Indians having only a right of occupancy in the

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lands, the presumption is against their authority to cut and sell the timber. (*United States* v. *Cook*, 17 Wall., 591, 594.)

The President is clothed with discretionary power, from year to year, to authorize Indians residing on a reservation to cut and sell timber for the sole benefit of such Indian or Indians. The language excludes the idea of an authority, in general terms, to all Indians on the reservation. It contemplates special authority to individuals. It may be granted at certain times, being exercised "from year to year." It is for the sole benefit of individual Indian or Indians, to be named, or designated, or recognized.

The authority is given, subject to such regulations as the President may prescribe. Regulations were framed by the Secretary of the Interior, approved by the President, and extended November 22, 1890, to the Indians of the Chippewa reservations in the State of Minnesota. These regulations provided that each Indian should provide his own logging outfit and supplies; that every Indian (except those whose children do not attend school, unless some good reason exists) on the reservation not well employed should be permitted and encouraged to engage in the work; that all cutting should be done under supervision from the agency; that except the superintendent and, if necessary, a foreman and blacksmith, all white laborers should be excluded from the reservation; that no sale should be valid until approved by the Commissioner of Indian Affairs; that after certain deductions the net

proceeds should be divided and paid by the agent to the individual or companies of the tribe in exact proportion to the scale of logs banked by each.

All work "in and about preparing the timber for market, every provision for the sale of and payment for the same, and distribution of the proceeds" were to be under the superintendence and control of the Commissioner of Indian Affairs and the Indian agent.

During the year 1891–92 five contracts were made between individual Indians and the defendants. All the timber cut and sold from these reservations is claimed to have been cut and sold under these contracts.

It seems to have been directed by the superintendent appointed to oversee the cutting that the Indians must cut under some one of these contracts. (Tr., pp. 85, 90, 91.)

These contracts were approved by the Commissioner of Indian Affairs and the President. They differed, in some of their terms, from the regulations published, as above stated. But, being approved, they became regulations within the statute for the acts done in pursuance of them. There was no other authority given to these Indians to cut and dispose of timber. There was none other properly recognized. All the terms of the permission must be strictly observed. To authorize these few Indians to have a monopoly of the cutting and disposition of all the dead and down timber on the reservation would be entirely violative of the intent of the President, as shown in the correspondence had between him and

the Secretary of the Interior. Taking into consideration the statute, the exercise of discretion by the President, as shown in the correspondence and the regulations, the differing and limited terms of the contracts as to amounts of logs to be delivered under each, two things are perfectly clear: First, that the logs were to be cut from dead timber, standing or fallen; second, that the Indians named in the several contracts were authorized to cut and sell only the amount stated in their contract. In the letter of November 21, 1890 (Tr., p. 113), the Secretary states that the Department had declined to approve a contract between Charles Losh and Nellie Lydick, Indians of the Lake Winibigoshish Reservation, and the Pine River Logging and Improvement Company, for the cutting and disposing of about 4,000,000 feet of pine logs from the dead and down timber of Lake Winibigoshish Reservation, Minn. He then recommends approval of this contract. Whether it was approved or not the record does not disclose. But this action, taken in 1890, shows how these contracts were entered into in reference to amounts permitted to be cut and disposed of. And the same course was continued in 1891–92.

This cutting and sale were for the benefit of the working Indian. The operation had nothing to do with the land. It was not like the clearing of the land for its improvement. It was not like the cutting of trees for mining purposes. It was not like the cutting of timber by railroads for construction purposes.

It was well said by the judge delivering the opinion

in this case, *United States* v. *Pine River Logging and Improvement Company* (89 Fed. R., 907, 912):

> The act in question, which authorized the cutting and removal of dead and down timber, under such regulations as might be prescribed by the President, was passed for the double purpose of preventing such timber from going to waste, and at the same time providing lucrative employment for such Indians residing on reservations as might desire to take advantage of its provisions. It must be presumed from the nature of the law, and the class of persons to whom it relates and whom it was intended to benefit, that it was the intention of Congress that such profit as might be realized from the sale of dead and down timber should, as far as possible, be shared alike by all reputable Indians residing on a reservation; that equal opportunities to cut and remove the dead and down timber found thereon should, at least, be afforded to all; and that, in administering the act, care should be taken by the executive department of the Government in granting licenses for the removal of timber, so that a few favored individuals, backed by large means, might not be able to appropriate all the benefits of the act, to the exclusion of the many. It must also be presumed that the law has heretofore been administered by the executive department of the Government, or, at least, that the intention has been to administer it in accordance with the legislative purpose last expressed. Inasmuch, then, as the approval by the President of the five contracts now in question in effect conferred on a few persons the right to

> appropriate all the dead and down timber that might be found on certain Indian reservations; if it be true, as is contended, that the stipulations as to quantity therein contained are immaterial and meaningless; and inasmuch as one of the main objects of the law would be defeated by granting to a few favored individuals a roving commission of that character, it is not reasonable to suppose that any such authority was intended to be conferred when such contracts were approved by the President. It is altogether probable that the provisions found in the several contracts, limiting the total quantity of timber to be cut to 2,750,000 feet, were regarded by the Executive Department of the Government as material and obligatory, and that the agreements were approved by the President upon that theory. Viewing the contracts, then, in the light of well-established rules applicable to their interpretation, and also in the light of the statute under which they were executed, it is clear, we think, that the quantity which could be lawfully cut and removed was definitely fixed by the contracts, and that there was no warrant in law for cutting an amount of timber which was to any considerable extent in excess of the prescribed quantity.

And it is to be remembered that the declarations of law by the circuit court of appeals, in the opinion just referred to, controlled the circuit court at the trial of the case, in which the judgment was rendered, from the affirmance of which judgment this writ of error has been taken. The assignments of errors are directed principally to the propositions declared in that opinion.

A similar view was taken in the recent case of *Nor. Pac. Ry. Co.* v. *Lewis* (162 U. S., 366, 376), Justice Peckham delivering the opinion of the court and approving *United States* v. *Cook* (supra):

> The Indians having only the right of occupancy in the lands, and therefore presumptively no right to cut timber for the purpose of selling, it was further held that if they cut timber in the process of improving the land, that fact must be shown; the presumption was against the authority to cut and sell the timber. Every purchaser from them, it was held, was charged with notice of this presumption, and that to maintain his title it was incumbent on the purchaser to show that the timber was rightfully severed from the land. So here. As the Government was the sole and absolute owner of these lands, and of the timber growing thereon, the presumption would be against the right of any third person to cut the timber, and if he claimed the right by virtue of any authority or license given him by the owner—that is, the Government—he would be compelled to show it.
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> Again, the consent to cut timber granted by the act of 1878 being upon the conditions and for the purposes therein specified and to the classes of persons therein described, whether the plaintiffs, who did this cutting, had complied with those conditions and had cut timber for the purposes mentioned, and were within the class of persons described in the statute, were facts which rested peculiarly within their own knowledge, the burden of showing which

would naturally and rightfully be cast upon them. As the plaintiffs failed to show that they came within the conditions and exceptions specified in the act of 1878, the presumption that they cut the timber illegally became conclusive.

II.

THE DEFENDANTS WERE NOT AUTHORIZED TO RECEIVE FROM AND PAY FOR, TO THE INDIANS, ANY TIMBER IN EXCESS OF THE AMOUNTS NAMED IN THE CONTRACTS.

These contracts depended for their validity upon the approval of the President. Their terms could not be enlarged or diminished without the President's sanction. Their chief characteristics, necessarily, were the amounts of logs to be delivered, the price to be paid, and the character of the timber to be cut.

It was not within the power of the parties signing the contracts—the Indians and the lumber companies—to alter or modify the conditions and terms of the contracts in any particular. To prevent any such combination was the very object of the regulations prescribed by the President, and of the law requiring these regulations. It is claimed by the defendants that where both of the parties to a contract by their subsequent conduct have given it a construction different from that which the law might have given it the courts will adopt that construction. The question determined in all the cases cited in support of this contention was as to the intention of the parties where there was ambiguity or uncertainty in the language of the agreement. Such was *Chicago*

v. *Sheldon* (9 Wall., 54) and the other cases cited. In *District of Columbia* v. *Gallaher, Loane & Co.*, much relied upon by the defendants, this court referred to the findings of fact and opinion of the Court of Claims and adopted the reasoning of that court upon the facts. Now that case was one where the contract required work to be done according to sample and specifications, under the direction of the engineer of one of the parties, and the sample and specifications being irreconcilable, the engineer ordered a modification, to which the contractor assented and the work was regarded as performed and accepted at the contract price. It is said that stress was laid upon the fact that the work was done under the supervision of the District engineer. This was because the work was "subject to the approval of the engineer," in the contract. (*Gallaher, Loane & Co.* v. *District of Columbia*, 19 C. Cl. R., 564.)

There is no ambiguity nor indefiniteness in the five contracts under discussion. They are alike in their terms, except the significant differences in the amounts of logs to be cut and delivered under each. The execution of these contracts did not "necessarily involve a practical construction." On the contrary, the language used is plain, simple, ordinary language. The loggers could cut nothing but dead and down timber. The companies could purchase nothing but dead and down timber. The contracts were all made in conformity with the "regulations," either so stated in the contracts or embodied in the approval. The contracts were executed before any cutting was done. The

quantities of logs to be cut and delivered were differently but explicitly stated. This was absolutely required in order to meet the requirement in the statute that the privilege of cutting was for the sole benefit of the Indian or Indians doing the work; and the expressed determination in the regulations that every Indian on the reservation not well employed should be permitted and encouraged to engage in the work and no favoritism should be shown by the agent in his management of the business. "The quantity specified is material and governs the contract." The use of the words "more or less" in some of the contracts, and the word "about" in others, emphasizes the conclusion that the quantities are limited and expressed. To hold that they neutralize the specific words of amount would be to make the latter useless and meaningless.

The true rules of interpretation of contracts like these are clearly laid down in *Brawley* v. *United States* (96 U. S., 168, 171, 172).

> Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of "about" or "more or less," or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an

estimate of the probable amount, in reference to which good faith is all that is required of the party making it.

* * * * *

But when no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words "about," "more or less," and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight.

If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significancy, then the contract is to be governed by such added stipulations or conditions. As, if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but by what the receiving party shall require for the use of his mill; and the variation from the quantity named will depend upon his discretion and requirements, so long as he acts in good faith.

* * * * *

The written contract merged all previous negotiations, and is presumed in law to express the final understanding of the parties. If the

> contract did not express the true agreement, it was the claimant's folly to have signed it. The court can not be governed by any such outside considerations. Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used.

See also *Norrington* v. *Wright* (115 U. S., 188).

In *Cabot* v. *Winsor* (1 Allen (Mass.) 550) the court held:

> Nor are the terms of the contract rendered uncertain or doubtful by reference to extrinsic facts, so as to create a latent ambiguity. The words "more or less," which seem to have given rise to the contention between the parties, have a plain, ordinary, and popular signification, and are often used in contracts relating both to real and personal estate. As applied to quantity, they are to be construed as qualifying a representation or statement of an absolute and definite amount, so that neither party to a contract can avoid it or set it aside by reason of any deficiency or surplus, occasioned by no fraud or want of good faith, if there is a reasonable approximation to the quantity specifically named as the subject of the contract. In sales of merchandise, especially in large quantities, where it is impossible to ascertain with precise accuracy the number or weight of the articles before concluding the contract for their purchase, it is necessary and usual to insert the

words "more or less" or "about" in connection with the specific amount, which forms the subject of the contract, in order to cover any variation from the estimate, which is likely to arise from differences in weight, errors in counting, diminution by shrinking, or other similar causes. But in such cases parol evidence is not admitted to show that the parties intended to buy and sell a different quantity or amount from that stated in the written agreement. On the contrary, it is held to be a contract for the sale of the quantity or amount specified; and the effect of the words "more or less" is only to permit the vendor to fulfill his contract by a delivery of so much as may reasonably and fairly be held to be a compliance with the contract, after making due allowance for an excess or short delivery arising from the usual and ordinary causes, which prevent an accurate estimate of the weight or number of the articles sold; or, as it is sometimes briefly expressed, it is "an absolute contract for a specific quantity within a reasonable limit." What is a reasonable limit and a substantial compliance with such contract, if the facts are not in dispute between the parties, is a question for the determination of the court. (*Cross* v. *Eglin*, 2 B. & Ad., 106); *Moore* v. *Campbell*, 10 Exch., 323; *Bourne* v. *Seymour*, 16 C. B., 336; *Stebbins* v. *Eddy*, 4 Mason, 414, 419; *Pembroke Iron Co.* v. *Parsons*, 5 Gray, 591.)

It was not therefore necessary for the loggers in this case to scale their cuttings each night in order to find whether they had reached the exact limits named in

the contracts, and had there been a slight excess or deficiency the words "about" and "more or less" in the permits would have been sufficient to protect them against the effect of the same; but it is preposterous to claim that a cutting more than six times as great as that permitted, and under the William Fairbanks contract, as construed by the plaintiffs in error, over sixteen times as great, is slight or unimportant. Nor is there any pretense that this variation was accidental, for all through the cutting the defendants below were careful to furnish money and supplies only to an extent justified by the logs then actually cut; and their claim is not that there was an accidental variation, but that, although such variation was intentional, it was justified by the contracts. This being so, and it being established that there was no accidental variation such as the words "about" and "more or less" were inserted to provide against, there is no issue of fact as to the amount of timber cut, because the conditions suggested by the quoted words did not arise and do not exist in the case at bar.

The qualifying words "about" and "more or less" were, then, inserted in these contracts to cover an accidental or unavoidable variation in amount. No such variation occurred. The circumstances provided for being nonexistent, the words are inoperative.

Again it appears that in their argument upon this subject the plaintiffs in error have assumed that the United States asks for a construction of the contracts on the theory that it is seeking to recover damages for

a breach of the same. As a matter of fact the contracts are not the subject of the action, which is one in trover; and as it must now be conceded that the terms of the contracts were violated by the loggers, both as to the amount and character of the timber cut, the position of the United States in suing upon the tort is clearly justified. This being so, under a strict construction, it is believed that the trial judge might properly have held that the plaintiffs in error were not entitled to any part of the logs named in the contracts which they had violated, and, therefore, instead of being injured by the ruling of the trial court, they are called upon to pay for 2,750,000 feet less than they actually converted.

> When a condition on which a donation was made has not been complied with, the donation may be revoked, whether the property donated be in the possession of the donee or of a transferee of the donee. (*Eskrige* v. *Farrar*, 30 La. Ann., 718; *Roundtree* v. *Smith*, 152 Ill., 493.)
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> A donee must take the gift with its conditions or not at all. (*Berry* v. *Berry*, 31 Iowa, 415.)

Whatever alternative propositions plaintiffs in error may present, the justification for their acts must rest upon rights obtained by their contracts. If they break loose from this mooring they are hopelessly adrift. They must rely upon the statute and the regulations. If they repudiate or ignore the contracts, they have neither. If they claim that the Indians could cut and sell any and all dead and down timber on the reservation, and that they purchased upon that belief, they

are met with the stubborn regulation that the logs should be sold at public sale to the highest bidder, either by auction or by calling for sealed proposals, at the discretion of the Secretary, for cash.

Nor, ignoring or attempting to explain away the provisions of the contracts, do they obtain any assistance by the fact, if sustained, that the work was done under the superintendence of a Government superintendent, and that at a final settlement the Indian agent, with full knowledge of the amount cut and delivered, received a balance due, and gave title to the logs. These acts were not within the province of such officers. The superintendent's duty was to go into the woods with the loggers and superintend and direct their labors, to the end that no green or growing timber might be cut, and no live trees damaged so as to cause them to die, and to inspect the scaling of the logs. The agent had nothing to do but to appoint the superintendent and to divide and pay the proportionate amounts due to the Indians. All the terms and stipulations of the contracts were settled by the President. A delegated power can not be delegated. No discretion to waive or alter any part of these agreements was given to these subordinate officers. In truth, one of the many irregular and unwarranted things, connected with all these transactions, is the utter disregard by these agents of the regulations established under the statute, as to the character of the timber cut, the furnishing of supplies, the employment of white labor, and the distribution of the work among all qualified Indians.

The fact that the dead-and-down timber would become valueless and rot if not quickly utilized, can not be used as an argument to show the intention to authorize the cutting and sale of all such timber on the reservation. If the authority had been given to that extent, as is rather indefinitely claimed, it necessarily follows that all the Indians able to work would have been afforded the facility and encouraged to do so. Not only was this not done, but all persons except the loggers named in the contracts were excluded and forbidden. It was never recognized by anyone that the utilization of this timber was an element contemplated, except as it afforded work for the Indians and the means of procuring food and clothing, for the want of which they were suffering. This gift, as it is well styled in the opinion of the learned judge in this case in 89 Fed. Rep., was determinate in respect to character, amount, and persons.

If timber, other than dead and fallen, or of an amount in excess of that named in the contract, was cut and removed with the agent's knowledge and consent, he acted without authority, whether through mistake, inadvertence, or fraudulent intent, and the Government is not bound.

As has been seen, the only duty of the logging superintendent was to go into the woods with the loggers to prevent the cutting of green or growing timber and the injury and death of living trees. No special agent can bind his principal beyond the limits of his express authority. (*Butler* v. *Maples*, 9 Wallace, 766.)

> The Government is not bound by the acts or declaration of its agent *unless it manifestly appears* that he acted within the scope of his authority, or was employed in his capacity as a public agent to do the act or make the declaration for it. (*Whiteside* v. *United States*, 93 U. S., 247.)

Any party dealing with such agent must, at his peril, ascertain the limits of the agent's authority. (Floyd Acceptances, 7 Wall., 666; *Schimmelpennick* v. *Bayard*, 1 Pet., 264; *Whiteside* v. *United States*, supra.)

Even if the last proposition were not correct, the principal is bound, if at all, as to acts not within the express authority by estoppel, and this is not a case where the Government may be estopped.

> No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power of its officers and agents. (*Gibbons* v. *United States*, 8 Wall., 269; *Minturn* v. *United States*, 106 U. S., 444; *Hart* v. *United States*, 95 U. S., 316; *Moffat* v. *United States*, 112 U. S., 24.)

As was said by Mr. Justice Bradley in *Chisholm* v. *The City of Montgomery* (2 Wood, 594):

> Public officers can not acquire authority by declaring that they have it. They can not thus shut the mouth of the public whom they represent. The officers and agents of private corporations intrusted by them with the management of their own business and property may estop their principals and subject them to the consequences of their unauthorized acts, but the body politic can not be thus silenced

by the acts or declarations of its agents. If it could be, unlimited scope would be given to the peculations and frauds of public officers. I hold it to be a sound proposition that no municipal or political body can be estopped by the acts or declarations of its officers from denying their authority to bind it.

The above propositions apply with equal force to the acts of both the Indian agent and the logging superintendent.

III.

THIS HAVING BEEN A WILLFUL TRESPASS, THE DOCTRINE AS TO THE MEASURE OF DAMAGES WAS CORRECTLY LAID DOWN BY THE CIRCUIT JUDGE, AND FOLLOWS THE RULE IN WOODENWARE COMPANY v. UNITED STATES (106 U. S., 432).

Where the plaintiff, in an action for timber cut and carried away from his land, recovers damages, the rule for assessing them against the defendant is:

1. Where he is a willful trespasser, the full value of the property at the time and place of demand or of suit brought, with no deduction for his labor and expense. 2. Where he is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the value at the time of conversion, less the amount which he and his vendor have added to its value. 3. Where he is a purchaser without wrong from a willful trespasser, the value at the time of such purchase.

Justice Miller, in delivering the opinion of the court (p. 435), says:

But the case before us is one where, by reason of the willful wrong of the party who

committed the trespass, he was liable, under the rule we have supposed to be established, for the value of the timber at Depere the moment before he sold it, and the question to be decided is whether the defendant, who purchased it then, with no notice that the property belonged to the United States, and with no intention to do wrong, must respond by the same rule of damages as his vendor should if he had been sued.

It seems to us that he must. The timber at all stages of the conversion was the property of plaintiff. Its purchase by defendant did not divest the title nor the right of possession. The recovery of any sum whatever is based upon that proposition. This right, at the moment preceding the purchase by defendant at Depere, was perfect, with no right in anyone to set up a claim for work and labor bestowed on it by the wrongdoer. It is also plain that by purchase from the wrongdoer defendant did not acquire any better title to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of *caveat emptor* applies, and hence the right of recovery in plaintiff.

On what ground, then, can it be maintained that the right to recover against him should not be just what it was against the vendor the moment before he interfered and acquired possession? If the case were one which concerned additional value placed upon the prop-

> erty by the work or labor of the defendant after he had purchased, the same rule might be applied as in case of the inadvertent trespasser.

This rule has been applied in numerous cases in the courts of original jurisdiction. (*United States* v. *Williams*, 18 Fed. Rep., 473; *United States* v. *Heilner*, 26 Fed. Rep., 80; *Cheney* v. *Stone Co.*, 41 Fed. Rep., 740; *United States* v. *Wingate*, 44 Fed. Rep., 129; *Kingory* v. *United States*, 44 Fed. Rep., 669; *United States* v. *Perkins*, 44 Fed. Rep., 670; *United States* v. *Baxter*, 46 Fed. Rep., 350.) As was said by Justice Brown, in *Shiver* v. *United States* (159 U. S., 491, 499), in speaking of a similar rule: "This general consensus of opinion is entitled to great weight as authority."

An ingenious attempt is made in the brief of counsel for plaintiff in error to distinguish the facts in the case at bar from the facts in the *Wooden Ware* case. The only foundation for this contention is that the parties acted under a mistake, that mistake being that the Indians and the contractors supposed that there was a right to cut all the dead and down timber and to dispose of it in the ordinary course of trade. This is not the mistake of fact referred to in one of the classes mentioned in the case cited. We do not think that collusion was necessary to make these parties liable. The mistake of the agent or superintendent could not protect the trespasser. This has been held even in the matter of homesteaders unlawfully cutting timber.

The good intention and exercise of judgment to effectuate a desired object could not authorize the agent to go beyond his defined powers.

In *United States* v. *McDougall's admr.* (121 U. S., 89), Wozencraft, an Indian agent, made a contract with McDougall for the delivery of certain cattle to Indians. Suit was brought by McDougall's administrator in the Court of Claims against the United States to recover for the value of the cattle, and it was set up by the claimants that although the instructions to Wozencraft did not extend to or embrace contracts for the subsistence of the Indian tribes in California, such a policy was, under all the circumstances, vital to the ends which those in charge of Indian affairs desired to accomplish, and that information of the proceedings of Wozencraft in making the contracts was given to the proper department at Washington, and that what they did was either approved or was not repudiated. This court asks, What statute, in express words or by necessary implication, invested Wozencraft with power to bind the United States by such a contract?

Various provisions of the statute were cited by the claimants, among others, that it was provided that all merchandise required by any Indian treaty for the Indians, payable after making of such treaty, should be purchased under the direction of the Secretary of the Interior upon certain conditions, and all merchandise should be purchased under the orders of the commissioners by such persons as they should appoint, or by such persons as should be designated by the President for the purpose, etc.; and the superintendent, agent, or subagent, together with such military officer as the President might direct, should

be present to certify to the delivery of all money and goods required to be paid or delivered to the Indians. It was also provided that it should be the general duty of Indian agents and subagents to manage and superintend the intercourse with the Indians within their respective agencies, agreeably to law, who obey all legal instructions given to them by the Secretary of the Interior, Commissioner of Indian Affairs, or the Superintendent of Indian Affairs, and to carry into effect such regulations as might be prescribed by the President. It was argued that these statutory provisions conferred authority upon the officers of the executive department to purchase, without limit as to amount, merchandise required for the making of any Indian treaty; and invested the President, through others, with power to make other purchases on account of the Indians, as well as payment to them, of money or goods. This court, after stating the power of the President under the statute, says: "But no officer of the Government was authorized to bind the United States by any contract for the subsistence of Indians not based upon the appropriations made by Congress. It is not claimed that the agreement between Wozencraft and McDougall was made with reference to such appropriations. On the contrary, Wozencraft and his colleagues were informed by a communication from the Indian Office, under date of June 27, 1851, that 'when the appropriation of $25,000 for holding treaties was exhausted, they should close their negotiations and proceed with the discharge of their duties as

agents simply, as the Department would not feel itself justified in authorizing anticipated expenditures beyond the amount of the appropriation made by Congress.' The findings show that when the written agreement with McDougall was made, Wozencraft and his colleagues knew that the appropriations had been exhausted. Besides, the contract on its face shows that it was made with reference to appropriations to be thereafter made. The parties evidently relied upon Congress recognizing the wisdom and necessity of the policy adopted for the pacification of the Indians in California, and, by legislation, applying the want of authority upon the part of Wozencraft and his colleagues to contract, in behalf of the United States, for the subsistence of the Indians in advance of the ratification of the treaties negotiated with them. That the policy pursued by Wozencraft and his colleagues was the only one that would have given peace to the inhabitants of California; that the Indians were induced by the promises of subsistence held out to them to abandon their lands to the whites and settle upon reservations selected for them, and that the United States thereby acquired title to the lands so abandoned, are considerations to be addressed to Congress in support of a special appropriation to pay the claim of McDougall's administrator."

It is altogether an error to contend that, in this case, value had been added to the property by the work of the defendants, before the conversion, because the defendants had furnished supplies to the Indians during the time of their work. Added value can only be con-

sidered after the delivery which makes the conversion. The advances made to the Indians were to them in part payment under an executory contract. All added value in this case was by the original wrongdoer.

In the *Wooden Ware* case the value of the services of the Indian loggers was paid to them as part of the consideration for the sale to the innocent purchaser. Here the defendants, by furnishing money and supplies to carry on the logging operations, advanced a part of the purchase price and thus increased the magnitude of the trespass beyond what the Indians unaided could have accomplished. This was done contrary to the rules prescribed by the President, which were a part of the law. It is difficult for the unbiased mind to grasp the effect of these distinctions as furnishing a foundation for an argument in favor of the superior equities in the case of plaintiffs in error.

It is a curious feature of counsel's reasoning that he first dwells upon the fact that defendants below had nothing to do with the original trespass, and then asserts an alleged equity, by reason of the fact that money and supplies were advanced to the original trespassers, which should, in his opinion, be credited to his clients, when these very advances made possible the commission of the tort.

There is no necessity to extend the doctrines of the Wooden Ware case. These defendants knew all the relations of the Indians to this property. It is true, as defendants say, that the timber here involved was cut and taken from Government land by Indians, who

were paid for their work by the defendants under contracts entered into before the cutting was begun. They were absolutely bound to know and observe the situation in all its aspects. A failure to require the strictest observance of salutary rules, prescribed as in this case, adds to the gravity of a situation vividly pictured by Justice Miller in the case being considered:

> It has long been a matter of complaint that the depredations upon these lands [i. e., Government lands] are rapidly destroying the finest forests in the world. Unlike the individual owner, who, by fencing and vigilant attention, can protect his valuable trees, the Government has no adequate defense against this great evil. Its liberality in allowing trees to be cut on its land for mining, agricultural, and other specified uses has been used to screen the lawless depredator who destroys and sells for profit.

IV.

OF DIRECTED VERDICTS.

To eliminate all issues of fact, the plaintiff, at the conclusion of the testimony, accepted defendants' admission of the amount of logs taken and their lowest evidence of value, and for the purposes of a motion for a directed verdict conceded that the defendants might be credited with the value of a quantity of logs equal to that named in the contracts (pp. 109–110).

> There is no doubt of the power of the circuit court to direct a verdict for the plaintiff upon the evidence presented in a cause, where it is clear that he is entitled to recover, and no matter affecting his claim is left in doubt to be

determined by the jury. Such a direction is eminently proper, when it would be the duty of the court to set aside a different verdict, if one were rendered. It would be an idle proceeding to submit the evidence to the jury, when they could justly find only in one way. (*North Pa. R. R. Co.* v. *Com. Nat. Bank of Chicago*, 123 U. S., 727; *Anderson County Commissioners* v. *Beal*, 113 U. S., 227, 241.)

Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. (*Ryder* v. *Wombwell*, Law Rep., 4 Ex., 39; *Giblien* v. *McMullen*, L. Rep., 2 P. C. App., 335.) Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury; but recent decisions of high authority have established a more reasonable rule—that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

Improvement & R. R. Co. v. *Munson*, 81 U. S., 442, citing:

Jewell v. *Parr*, 13 C. B., 916.

Toomey v. *L. & B. R. R. Co.*, 3 C. B. N. S., 150.

Wheelton v. *Hardesty*, 8 Ell. & Bl., 266.

Schuchardt v. *Allen*, 1 Wall., 369.

It is true that questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by a jury; yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict.

Elliott v. *Chicago, M. & St. P. R. R. Co.*, 150 U. S., 245, citing:

Chicago, R. I. & P. R. R. Co. v. *Houston*, 95 U. S., 697.

Schofield v. *Chicago, M. & St P. R. Co.*, 114 U. S., 615.

Delaware, L. & W. R. Co. v. *Converse*, 139 U. S., 469.

Aerkfetz v. *Humphreys*, 145 U. S., 418.

This court, by Justice Miller, in *Pleasants* v. *Fant* (89 U. S., 116, 120), said:

But we are pressed with the proposition that it was for the jury to decide this question, because the testimony received and offered had some tendency to establish a participation in the profits, and the question of liability under such circumstances should have been submitted to them, with such declaration of what constitutes a partnership as would enable them to decide correctly.

No doubt there are decisions to be found which go a long way to hold that if there is the slightest tendency in any part of the evidence to support plaintiff's case, it must be submitted to the jury, and in the present case, if the court had so submitted it, with proper instructions, it

would be difficult to say that it would have been an error of which the defendant could have complained here.

But, as was said by this court in the case of *The Improvement Co.* v. *Munson* (14 Wall., 448), recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

The English cases there cited fully sustain the proposition (see *Jewell* v. *Parr*, 13 C. B., 916; *Toomey* v. *L. & B. R. Co.*, 3 C. B. (N. S.), 146; *Ryder* v. *Wombwell*, 4 L. R. Exch., 33), and the decisions of this court have generally been to the same effect.

In the case of *Parks* v. *Ross* (11 How., 362) this court held that the practice of granting an instruction like the present had superseded the ancient practice of demurrer to evidence, and that it answered the same purpose and should be tested by the same rules; and in that case it said the question for the consideration of the court was whether the evidence submitted was sufficient to authorize the jury in finding the contract set up by plaintiff. And in *Schuchardt* v. *Allens* (1 Wall., 359) this case is referred to as establishing the doctrine that if the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly. * * *

It is the duty of a court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues and rejecting all else, by instructing them in the rules of law by which the evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law.

In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor, not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury. But conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony, in such a case, of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if

> the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury.

In *Railroad Co.* v. *Converse* (139 U. S., 469) this was approved. This court (p. 472) said:

> But it is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.

More than a mere scintilla of evidence is required to justify submitting the issues to the jury, especially where it is met not only by the positive testimony of disinterested witnesses, but also by well-known and recognized physical facts about which there is no conflict. (*Laidlow* v. *Sage*, 158 N. Y., 73.)

See also—

Griggs v. *Houston*, 104 U. S., 553.
Randall v. *Railroad Co.*, 109 U. S., 478, 482.
Marshall v. *Hubbard*, 117 U. S., 415.
Railway Co. v. *Cox*, 145 U. S., 593.
Meehan v. *Valentine*, 145 U. S., 611, 618.
Thompson v. *Pioneer Press Co.*, 37 Minn., 285.
Oscanyan v. *W. R. Arms Co.*, 103 U. S., 261.
Insurance Co. v. *Doster*, 106 U. S., 30, 32.
Arthur v. *Morgan*, 112 U. S., 495.
Herbert v. *Butler*, 97 U. S., 319, 320.

Bevens v. *United States*, 13 Wall., 56.
Walbrun v. *Babbitt*, 16 Wall., 577.
Hendrick v. *Lindsay*, 93 U. S., 143.

In the case of *Northwestern Fuel Co.* v. *Danielson* (57 Fed. Rep., 920) the circuit court of appeals for the eighth circuit said:

> Where there is no dispute about the facts, and they are such that but one conclusion can fairly be drawn from them *by reasonable men*, it is the duty of the court to declare that conclusion to the jury. *If the evidence is of such a conclusive character that the court, in the exercise of a sound judicial discretion*, would be bound to set aside a verdict returned in opposition to it, it is its duty to direct a verdict for the plaintiff or the defendant, as may be proper. *Chicago, St. P., M. & O. Ry.* v *Belliwith*, 83 Fed. Rep., 437, 440.

A JOINT JUDGMENT WAS CORRECT.

Counsel for plaintiffs in error asks this court to consider a question relative to the joint character of the tort involved in this cause. No such question was presented to either the trial court or the circuit court of appeals. It is true that defendants tendered such an issue in their pleadings, but upon the second trial of the case they waived the question and admitted that their liability, if any, was joint. In his instructions to the jury (pp. 109, 110) the trial judge states the questions presented and argued, and no suggestion is found concerning the several or joint character of the conversion. The specification of error, found in the brief of plaintiffs in error, upon this point is not based on any of the

assignments of error filed at the time of securing the writs of error either to the trial court or to the court of appeals. (See those assignments, pp. 125 and 138.) In the fourteenth assignment of error (p. 141) the questions, which the defendants below conceived the judge should have submitted to the jury, are particularly pointed out and no suggestion of the present alleged error is found, nor was it argued in either the circuit court or the court of appeals. The appellate jurisdiction of the circuit court of appeals is in effect eliminated if issues neither before that court nor before the trial court are to be determined here.

It is a general rule that an objection to want of proof of a fact, which might be met at once, must be taken at the trial or it will be considered as waived, except as to matters going to the jurisdiction of the court. (*O'Reilly* v. *Campbell*, 116 U. S., 418.)

An objection to a variance between allegations and proof, not taken at the trial, can not avail in the higher court, if it could have been obviated in the court below. (*Roberts* v. *Graham*, 6 Wall., 578.)

In the case of *Camden* v. *Stewart* (144 U. S., 104) this court stated, that, for want of a proper assignment of error, it would have been justified in refusing to take cognizance of the case, and there being no assignment of error, if the evidence was inconclusive, the presumption in favor of the correctness of the decision of the lower court must prevail, and this rule was applied even to the presumption in favor of a master's report.

There is, however, in the record ample evidence of the joint character of the wrong complained of; in fact, while upon the stand as witnesses, the defendants admit that they were jointly interested in taking the logs.

On page 96 of the record the defendant, C. A. Smith, who was a member of the firm of C. A. Smith & Co., and also secretary and treasurer of the Pine River Logging and Improvement Company, testifies as follows:

> During the logging season of 1891–92 *the defendants* established a logging-supply bureau at Deer River, and Mr. Meldahl had charge of it, representing *the defendants.* The logs cut under these five contracts were divided equally between C. A. Smith & Co., and J. B. Bassett & Co. The Pine River Logging and Improvement Company was practically controlled by C. A. Smith & Co. *The defendants* employed Henry McAllister and Arno Mereen in the various camps during that winter. The log mark CAS, which was used on a large number of these logs, was the property of C. A. Smith & Co. prior to these logging operations. The mark E girdle B was put on all the long logs cut in all these cuttings.

The same defendant amplifies some of these facts on page 101 of the record.

William L. Bassett, another of the defendants and a member of the firm of J. B. Bassett & Co., testifies to the same effect (pp. 106–108).

It may be said by the plaintiffs in error that the words

"defendants" and "we" as used by these witnesses do not necessarily include all of the defendants, but it is to be observed that these two witnesses together represent all the defendants; that both of them admit that the agents Meldahl, Mereen, and McAllister, who were engaged in the immediate supervision of the transactions for the plaintiffs in error upon the reservations, were equally the agents of their respective firms, and they both likewise admit that the logs were divided equally between them; that the log marks C A S, which indicated the property of C. A. Smith & Co., were placed upon some logs in all the cuttings; that when the defendants, C. A. Smith and W. L. Bassett, visited the reservation during the cutting of this timber, each showed an equal interest in the logs supposed to be cut under the contracts of the other as in those cut under his own contracts, and the witness Bassett admits (p. 108) that his firm received a part of the 8,000,000 feet which defendants claimed were cut under the Fairbanks contract in which, on its face, his firm had no interest. Further, defendants themselves proved that C. A. Smith & Co. paid the balance due on the contracts of the logging company (defendants' Exhibit 3, p. 119), and that the same firm was engaged in discounting the time checks used in all the cuttings (Exhibits F/1, F/2, and F/3, pp. 118, 119). These facts are all shown by the testimony of the defendants themselves, and they offered not one word of evidence to rebut, or in any way modify the presumption, arising from their conduct, that they were all acting jointly.

A person who consents to the commission of a tort, or aids or abets it, is guilty of the wrongful act in like degree with any other tort feasor. (1 Chit. Plead., 180; *Sanborn* v. *Sturtevant*, 17 Minn., 174, 179; *Cleak* v. *Whitaker*, 19 Conn., 319; 48 Am. Dec., 160.)

If this point is before the court, which is strenuously denied, there is ample testimony to make a *prima facie* case of joint conversion. It was not contradicted, and there was, therefore, no issue to submit to the jury.

The objection now made by counsel for the plaintiffs in error is in the nature of a demurrer to the evidence, and a general demurrer to evidence will not avail. The specific defect must be pointed out and preserved in the record from the lower court. (*Van Stone* v. *Stillwell*, 142 U. S., 128.)

None of the general assignments to the direction of the verdict, or to the entry of judgment upon that verdict, are sufficient to cover this point, which, as we have seen, was not suggested to either the trial judge or the judges of the court of appeals.

COSTS OF THE CIRCUIT COURT MAY BE TAXED IN FAVOR OF THE UNITED STATES.

In the case of the *United States* v. *Davis* (54 Fed., 147) the court of appeals to which the writ of error in this case is directed, said:

> It will not be questioned that generally costs may now be awarded to the United States when it is the prevailing party.

It is conceded by counsel for the plaintiffs in error that it is the general practice of circuit courts to allow

costs in favor of the United States, and the numerous cases to this effect will not therefore be reviewed here. In the case of the *United States* v. *Sanborn* (135 U. S., 271) the question was directly before this court, and the lower court was reversed because it had not taxed certain items on behalf of the United States. This case would seem to dispose of counsel's contention, particularly as it has been repeatedly and uniformly followed since the decision was handed down.

THE ITEM OF $356.69, FOR THE REPORTER'S TRANSCRIPT OF THE RECORD, NECESSARILY USED BY THE PLAINTIFF IN PREPARING ITS BILL OF EXCEPTIONS ON THE FORMER APPEAL, WAS PROPERLY ALLOWED.

Paragraph 3 of rule 31 of the circuit court of appeals is as follows:

> The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

The clerk of the circuit court, who originally taxed the costs, as well as counsel for the United States, understood this rule to apply to the fees of the reporter for furnishing a transcript used in preparing the record for the appellate court, as well as to the costs of the clerk of the circuit court for certifying the record. This is believed to be the uniform practice in the eighth circuit, and it is certainly well settled in the courts of the State of Minnesota. (*In re Ovid Pinney*, 27 Minn., 280; *Linne* v. *Forrestal*, 51 Minn., 249.)

The only case cited by the plaintiffs in error in opposition to this view is that of *Monahan* v. *Godkin*

(100 Fed., 196). This is the decision of a trial judge never sustained, as far as counsel for defendant in error is aware, by any appellate court.

The only case from an appellate court cited by Judge Seaman, in rendering the decision last referred to, is that of *The William Branfoot* (52 Fed., 390), and that case is not in point, for it appears that the disbursement for the transcript of the reporters' minutes, there attempted to be taxed, was incurred for the convenience of counsel in trying the case. There is no suggestion that the copy of the stenographer's notes, for which this disbursement was made, was used in or made a part of the record for an appeal.

V.

The contention of counsel that, in any event, the defendants should be credited with the 10 per cent stumpage, paid to the poor fund for the Indians, is clearly met in the language of Judge Thayer, as follows:

> We are unable to perceive any legal ground upon which payments that they may have made into the Indian poor fund for the support of indigent Indians can be accepted or regarded as payments made to the United States for its benefit. Such payments stand on the same footing as a payment made to a third party, inasmuch as the Government received the money simply as a trustee for the benefit of poor Indians and has doubtless expended it for their benefit.

The other questions alluded to in the brief of plaintiffs in error do not appear to be material to the determination of the issues before this court.

For the convenience of the court we have added as an appendix to this brief the rules prescribed by the President pursuant to statute for cutting dead and fallen timber, and also a copy of one of the contracts (all of which are in the same general form) relied upon by plaintiffs in error as a justification of their acts.

JOHN E. STRYKER,
Special Assistant United States Attorney.
ROBERT A. HOWARD,
Special Assistant United States Attorney.

JOHN K. RICHARDS,
Solicitor-General.

APPENDIX.

REGULATIONS.

First. That each Indian who engages in the work of preparing for the market the dead and down timber on his reservation during the current fiscal year shall provide his own logging outfit and supplies.

Second. No Indian to be allowed to log who has children of school age not attending school a reasonable length of time each year, unless in the opinion of his agent some good reasons exist in special cases which are sufficient to exempt particular persons from this requirement; otherwise, every Indian on the reservation not well employed should be permitted and encouraged to engage in the work, and no favoritism shall be shown by the agent in his management of the business.

Third. A reliable and otherwise properly qualified white man to be detailed, if any such can be spared from the agency employee force; or if no regular agency employee is available, then to be appointed by authority of the Secretary of the Interior and to be paid a reasonable salary from the proceeds of the sale of the logs, for such time as service may be actually necessary, whose duty it will be to go into the woods with the loggers and superintend and direct their labors, to the end that no green or growing timber may be cut, and that no live trees are damaged in any manner so as to cause them to die, that they may be marketed under the provisions of the act in question, and to inspect the scaling of the logs.

Fourth. With the exception of a superintendent provided for by the preceding item, and in cases where persons of sufficient knowledge and skill for foremen and blacksmiths can not be found among the Indians, all white labor to be excluded from the reservation.

Fifth. One-half of the cost of scaling to be paid for by the loggers, and one-half by the purchasers of the logs.

Sixth. The logs shall be cut and banked or otherwise made ready for sale by the Indians, under the supervision of the superintendent and direction of the agent, at such place or places as he shall direct, and shall be sold at public sale to the highest bidder either by auction or by calling for sealed proposals, at the discretion of the Secretary of the Interior, in such lots as shall be most expedient, and under the personal direction of the agent, for cash, after at least two weeks' notice by publication in newspapers at the places where the usual markets for logs exist, and where best calculated to give notice; also, by such other means as shall give greatest publicity.

Seventh. No sale of the logs to be valid until approved by the Commissioner of Indian Affairs.

Eighth. Ten per cent of the gross proceeds derived from the sale of the logs to go to the stumpage or poor fund of the tribe, from which the old, sick, and otherwise helpless may be supported.

Ninth. All expenses of sale, such as advertising, telegraphing, one-half of the cost of scaling, and 10 per cent of the gross proceeds of the sale, for the stumpage or poor fund, to be deducted, and the net proceeds remaining to be divided and paid by the agent to the individuals or companies of the tribe in exact proportion to the scale of logs banked by each.

(Transcript, pp. 112 and 113.)

THE CONTRACT.

In and for the consideration below named, Schaggeeshig, Indian, party of the first part, hereby enters into an agreement with J. B. Bassett & Co., as parties of the second part, to cut, haul, and deliver during the season of 1891 and 1892, on or tributary to the Mississippi River, two hundred fifty thousand feet, more or less, of pine saw logs, to be cut on the Indian reservation, from dead and down timber, under the supervision of the United States Indian agent or his deputies.

Said logs to be well cut and well marked with the following bark mark, FX, and the following stamp mark, F. Said party of the first part further agrees to cut, haul, and place around said logs a sufficient amount of timber, suitable for boom sticks, for the booming of the said logs into rafts of convenient size for driving across the flowage of the Government dam.

Said party of the first part further agrees to hold the second party harmless from any and all claims for labor or otherwise which are or may be lienable claims, and attached upon the said logs, and that all labors must be paid in full.

Said party of the first part further agrees that the second parties will pay the United States Indian Department or its authorized agents the sum stipulated by said Department to be paid to it as stumpage for said timber, which amount, being ten per cent of purchase price, shall be deducted from the price per thousand feet below named.

As a consideration for this agreement, and for the above-named services, the said J. B Bassett & Co. hereby agrees to pay the said first party the uniform price of four dollars per thousand feet, board measure, for said logs (and one-half scalage), so cut, marked,

hauled, and landed in accordance with the following terms: After fifty thousand feet of logs have been cut, marked, and scaled, then the said second parties will pay the said first party the sum of one hundred dollars (i. e., two dollars ($2.00) per thousand feet), to enable them to purchase supplies and pay the necessary expenses. As soon as another fifty thousand (50,000) feet shall have been cut, marked, hauled, and scaled, the said second parties will pay the said first party a further sum of one hundred dollars (i. e., two dollars per thousand feet). When one hundred thousand feet shall have been cut, marked, hauled, and scaled, the second parties agree to pay from time to time such further amounts as may be desired by the agent as will make, with advanced payments already made, the sum of $2.00 per thousand feet for any and all logs delivered on above lands as fast as scaled, and the further sum of one dollar per thousand feet at the end of the logging season on all logs that show by scale to have been cut, marked, and hauled, and the balance sixty days thereafter.

It is mutually stipulated and agreed by and between the parties hereto that the sale of the surveyor-general for the scaling of logs and lumber in the second district Minnesota, or his deputies, shall be conclusive and final between said parties.

It is mutually understood and agreed by the parties to this contract that the logging operations shall be under the supervision of the U. S. Indian agent for the White Earth Indian Agency, of Minnesota, and that all payments mentioned herein shall also be under his supervision. The fulfillment of all agreements under this contract shall be in conformity with the regulations prescribed by the President of the United

States, dated Oct. 17, 1890, to govern the logging by the Indians, in the Indian reservation of White Earth Agency, of Minnesota.

SHOCAGGEESHIG (his x mark).
J. B. BASSETT & CO.,
By WILLIAM L. BASSETT.

In presence of—
A. R. ROGERS.
HENRY A. MCALISTER.

STATE OF MINNESOTA,
County of Itasca, ss:

On the 29th day of Oct., A. D. 1891, before me, a notary public in and for the State of Minnesota, personally appeared Shocaggeeshig, by me known to be the party who executed the foregoing and within instrument, and acknowledged that he executed the same as his free act and deed.

[SEAL.] A. R. ROGERS,
Notary Public, Minnesota.

STATE OF MINNESOTA,
County of Hennepin, ss:

On this 3d day of November, A. D. 1891, before me, a notary public within the said Hennepin County, State of Minnesota, personally appeared William L. Bassett, known to be a partner in the firm of J. B. Bassett & Co., with full power to execute contracts, and who executed the foregoing and within instrument and acknowledged that he executed the same freely and voluntarily for said J. B. Bassett & Co., of which firm he is a partner.

[SEAL.] A. R. ROGERS,
Notary Public, Hennepin County, Minnesota.

STATE OF MINNESOTA,
County of Itasca, ss:

On this 29th day of October, A. D. 1891, before me personally appeared Shocaggeeshig, who, being duly sworn, deposes and says that he is of Indian descent, and that he has been, and that he now is, living upon and enjoying the privileges of the Mississippi River Indian Reservation, and as such is entitled to the rights and considerations as granted him by the Government of the United States.

SHOCAGGEESHIG (his x mark).

Witness as to mark:
A. R. ROGERS.

[SEAL.]

A. R. ROGERS,
Notary Public, Minn.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Nov. 27, 1891.

Agreeable with authority of the President, indorsed (November 24th, 1891) on Department letter to him of November 16th, 1891, the within contract is hereby approved.

T. J. MORGAN,
Commissioner.

DEPARTMENT OF THE INTERIOR,
Nov. 27, 1891.

Approved.

JOHN W. NOBLE, *Secretary.*

(Transcript, pp. 45–47.)

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